



## **CONSENSUSDOCS 801** **STANDARD OWNER AND CONSTRUCTION MANAGER** **AGREEMENT**

**(Where the Construction Manager Is the Owner's Agent and the Owner Enters  
 Into Trade Contracts)**

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This Agreement has important legal and insurance consequences. Consultation with an attorney and insurance consultant is encouraged with respect to its completion or modification.

## **ARTICLE 1 AGREEMENT**

This Agreement is made effective as of the 21<sup>st</sup> day of May, in the year 2015, by and between the

**OWNER:** The State of Iowa is the Owner. The Iowa Department of Administrative Services ("DAS") is vested with the statutory authority to administer this Agreement on behalf of the State. DAS's principal office is located at: Hoover Building, 3rd Floor -1305 E. Walnut, Des Moines, IA 50319.

and the

**CONSTRUCTION MANAGER:** Sample Construction Management ("CM") Company.

(CM and Owner referred to herein collectively as the "Parties")

for construction management services ("Services") in connection with the following PROJECT:

Various projects for State Design & Construction Resources Bureau.

The Construction Manager firm will perform services per State of Iowa RFP 0215335062. The Construction Manager will work with DAS and other applicable state government agencies to successfully plan the design, construction and closeout of the various projects.

The DESIGN PROFESSIONAL for the Project is:

To Be Determined

Notice to the Parties shall be given at the above addresses for the principal offices identified above.

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NOTICE: This Agreement contains the terms and conditions for which the Construction Manager will provide the Services described below for a Project. The Construction Manager will only provide Services under this Agreement for Projects that have been particularly identified in a fully executed exhibit to this Agreement. Before an exhibit to this Agreement takes effect it must be signed by both the Director of the Department of Administrative Services or Designee and the authorized representative of the Construction Manager. The Owner has made no commitment or promise to the Construction Manager that the Construction Manager will be asked to provide Services under this Agreement for a Project other than the Project particularly identified in a fully executed exhibit.

TERM: This Agreement will be in effect until November 30, 2016, with five (5), one (1) year extensions that may be optioned at the end of each contract year. This Agreement may be terminated by the Owner at any time in the future for any of the reasons, including convenience, provided below.

## **ARTICLE 2**

### **RELATIONSHIP OF PARTIES AND EXTENT OF AGREEMENT**

2.1 RELATIONSHIP OF PARTIES. The Construction Manager shall be authorized to act on behalf of the Owner to the extent provided in this Agreement, shall exercise its skill and judgment in furnishing construction administrative and management services, and shall perform its services in an economical and timely manner. The Owner shall retain Trade Contractors, Design Professional(s), consultants, testing and inspecting agencies, and insurance or legal advisors to perform all other work and services needed for the Project. The Owner and Construction Manager shall endeavor to promote harmony and cooperation among all Project participants.

2.1.1 DESIGN PROFESSIONAL. The Owner shall retain or employ one or more Design Professional(s) to provide all required architectural, landscape architectural, engineering and design services for the Project, including, without limitation, structural, mechanical and electrical engineering services. The Construction Manager shall coordinate its scope of services with that of the Design Professional so as to avoid any duplication of services. The Owner shall cause the Design Professional to provide those services reasonably requested by the Construction Manager and included within the Design Professional's scope of services under its agreement with the Owner and to facilitate the Design Professional's observation of construction site progress and review of construction, consistent with Iowa Code chapters 542B, 544A, 544B. Such services shall be provided promptly and in accordance with schedules agreed upon by the Owner, Construction Manager and Design Professional. The Construction Manager shall provide those services reasonably requested by the Owner and the Design Professional and included within the Construction Manager's Scope of services under this Agreement. Such services shall be provided promptly and in accordance with time schedules agreed upon by the Owner, Construction Manager and Design Professional. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Design Professional. The Agreement between the Owner and the Design Professional shall not be modified without written notification to the Construction Manager.

2.1.2 The Owner and the Construction Manager shall ensure at a minimum that:

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2.1.2.1 conflicts of interest, as defined by Iowa law, shall be avoided or disclosed promptly to the other Party; and

2.1.2.2 the Owner and the Construction Manager warrant that they have not and shall not pay nor receive any contingent fees or gratuities to or from the other Party, including their agents, officers and employees, subcontractors, subconsultants or others from whom they may be liable, to secure preferential treatment.

2.2 EXTENT OF AGREEMENT. This Agreement is solely for the benefit of the Parties, represents the entire integrated agreement between the Parties, and supersedes all prior negotiations, representations and agreements, either written or oral. This Agreement and each and every provision is for the exclusive benefit of the Owner and the Construction Manager and not for the benefit of any third party except to the extent expressly provided in this Agreement. In the event of conflict between Articles 1-14 of this Agreement, as properly amended, and any of the exhibits or any other documents incorporated into this Agreement, the terms and provisions of Articles 1-14 shall control. The Agreement may only be subsequently modified by the parties by a written amendment signed by the Director of the Department of Administrative Services or Designee and the authorized representative of the Construction Manager.

2.3 CONSTRUCTION MANAGER-AGENT IS INDEPENDENT CONTRACTOR. Notwithstanding the fact that Construction Manager-Agent is authorized to perform certain duties on behalf of the Owner or is referred to as "agent" for the purposes specified in this Agreement, the Parties agree that the Construction Manager is an independent contractor and is not an agent of the state of Iowa and the Construction Manager's employees are not employees or agents of the state of Iowa within the meaning of Iowa Code Chapter 669. The use of the term "agent" in this agreement is solely for convenience and to distinguish the Construction Manager as Agent from a Construction Manager at Risk as such terms are used in the construction industry. Accordingly, neither Construction Manager nor any of its employees is an "employee of the state" covered by Iowa Code chapter 669. As an Independent Contractor, the Construction Manager is responsible for its office space, support staff, and equipment or tools. The Construction Manager and its staff are not eligible for any State of Iowa employee benefits. The Construction Manager is responsible for paying any income tax it owes as a result of this Agreement and the payment received for Services provided hereunder. To the extent this provision is read to contradict any other provision of this Agreement or any other agreement related the Project this provision shall control.

## 2.4 DEFINITIONS

2.4.1 Agreement means this ConsensusDOCS 801 Standard Owner and Construction Manager Agreement, as modified by the Parties, and Exhibits and Attachments made part of this Agreement upon its execution.

2.4.2 Design Professional means the Architect, Design Professional or Engineer identified in Article 1 and its consultants, retained by the Owner to perform design services for the Project, and licensed in the state of Iowa. The use of the term Design Professional in this Agreement is for convenience and is not intended to imply or infer that the individual or entity named in Article 1 will provide design professional services in a discipline in which it is not licensed.

2.4.3 Construction Budget means the sum of the estimated costs of all construction, the clarifications and assumptions upon which it is based, allowances, reasonable contingencies and the Construction Manager's Compensation.

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2.4.4 Construction Documents means the plans, specifications and other documents provided by the Design Professional to the Owner which delineate the design and specify other necessary requirements relating to the construction of the Project.

2.4.5 Construction Manager means the Construction Manager identified in Article 1 and its authorized representative.

2.4.6 The Construction Schedule is the document initially prepared by and updated by the Construction Manager and approved by the Owner that indicates proposed activity sequences, durations, or milestone dates for such activities as receipt and approval of pertinent information, issuance of the Construction Documents, the preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements and, estimated Date of Substantial Completion of the Project, and the Date of Final Completion of the Project. The Construction Schedule shall show the critical path and be based on the critical path method.

2.4.7 The term Cost of Construction shall mean the Owner's total cost of construction of the Project components (excluding the services provided by the Construction Manager and/or any other professional service). In the event the Project is not completed, Cost of Construction shall mean the final approved estimated cost of construction of Project components (excluding the services provided by the Construction Manager and/or any other professional service). The estimated Cost of Construction has the same meaning as the "estimated total cost of a public improvement" set forth in Iowa Code Section 26.2 and thereby affects the appropriate competitive bidding procedure for the Project. Cost of Construction is synonymous with the Cost of the Work for the entire Project.

2.4.8 The term Day shall mean calendar day unless otherwise specifically defined.

2.4.9 Direct personnel Expenses means the compensation for the Construction Manager's personnel engaged on the Project for that portion of their time attributable to the Project at agreed upon rates identified in Article 7 of this Agreement.

2.4.10 Fee means the compensation set forth in Article 7 of this Agreement.

2.4.11 General Conditions Items means the provision of facilities or performance of work by the Construction Manager for items which do not readily lend themselves to inclusion in one of the separate Trade Contracts or items as may be mutually agreed upon in writing between the Owner and Construction Manager. General Conditions Items may include but are not necessarily limited to the following: preparation for ceremonies; signs; watchmen; photographs; field office(s) and related costs thereof such as equipment, furnishings and office supplies; temporary toilets; communication equipment; temporary utility services; cleanup; refuse removal services; trash chutes; surveys; testing; and temporary roads and parking. The Construction Manager will not perform work that is legally required to be let out for competitive bidding in accordance with Iowa Code Chapter 8A or 26 unless such work has been awarded to the Construction Manager in accordance with such requirements. In addition, Construction Manager shall not perform any construction work without specific written authorization from the Owner.

2.4.12 A Hazardous Material is any substance or material identified now or in the future as toxic or hazardous under any federal, state or local law or regulation, or any other substance or material which may be considered hazardous or otherwise subject to statutory or regulatory requirements governing handling, disposal or cleanup.

2.4.13 A Material Supplier is a person or entity retained by the Trade Contractor to provide material or equipment for the Work. This definition is not intended to, and shall not be interpreted to, expand or modify the definition(s) of "Material" contained in Iowa Code Chapter 573.1.

2.4.14 Others means other contractors, material suppliers and persons at the Worksite who are not employed by Trade Contractor or Subcontractors. Others does not include the Construction Manager or the Design Professional.

2.4.15 Owner is the person or entity identified in Article 1 as Owner, and includes the Owner's Representative.

2.4.16 The Owner's Program is an initial description of the Owner's objectives, including budget and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, site requirements, and any requirements for phased occupancy.

2.4.17 The Project, as identified in Article 1, is the building, facility or other improvements, of which construction is one part, for which the Construction Manager is to provide services under this Agreement.

2.4.18 The Services are the construction management services and the General Conditions Items, if any, provided by the Construction Manager under this Agreement.

2.4.19 RFP means the Request for Proposals (and Addenda thereto) issued to solicit the construction management services for the Project.

2.4.20 A Subcontractor is a person or entity retained by a Trade Contractor as an independent contractor to provide the labor, materials, equipment or services necessary to complete a specific portion of the Work.

2.4.21 Substantial Completion is the date the Project is "substantially completed" as defined in Iowa Code Section 26.13.

2.4.22 Final Completion is the date upon which all Work constituting the Project is complete and is certified as having been finally completed by the Design Professional authorized to make such certification.

2.4.23 Terrorism means a violent act, or an act that is dangerous to human life, property or infrastructure, that is committed by an individual or individuals and that appears to be part of an effort to coerce a civilian population or to influence the policy or affect the conduct of any government by coercion. Terrorism includes, but is not limited to, any act certified by the United States government as an act of terrorism pursuant to the Terrorism Risk Insurance Act, as amended.



2.4.24 Trade Contractor means a party or entity retained by the Owner as an independent contractor to provide the labor, materials, equipment or services necessary to complete a specific portion of the Work. A Trade Contractor is a “principal” and “principal contractor” as such terms are used in Iowa Code Chapter 573.

2.4.25 Work means the construction and services provided by the Trade Contractors necessary or incidental to fulfill the Trade Contractor's obligations for the Project in accordance with and reasonably inferable from the Construction Documents. The Work may refer to the whole Project or only a part of the Project.

2.4.25.1 Defective Work is any portion of the Work that is not in conformance with the Construction Documents.

2.4.26 Worksite means the geographical area at the location of the Project as identified in Article 1 where the Work is to be performed.

### **ARTICLE 3 CONSTRUCTION MANAGER'S SERVICES**

The Construction Manager shall provide the following services, as may be more fully defined by one or more exhibits attached to this Agreement. The Construction Manager warrants that it will perform its services in accordance with the standard of care with which it would approach its own vital business affairs and no less than the standard of care normally practiced by construction management firms in performing services of a similar nature at the time and place the services are performed.

This Agreement contemplates that the Construction Manager shall perform services in connection with more than one Project. Accordingly, The Construction Manager shall perform each of the services listed in this Article or otherwise contemplated by this Agreement with respect to each and every separate Project. Each Project will proceed through the phases listed below according to the schedule contemplated in such Project Specific Exhibit.

#### **3.1 PRECONSTRUCTION PHASE SERVICES**

3.1.1 REVIEW OF OWNER'S PROGRAM. The Construction Manager shall review the Owner's Program to confirm its understanding of the requirements of the Project as such requirements impact the services to be provided under this Agreement and to verify such understanding with the Owner and Design Professional. The Owner, however, may not have an official written Program for this Project. In such case, the Construction Manager will work with the Owner and the Design Professional to verify the Owner's objectives, including budget and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, site requirements and any requirements for phased occupancy.

3.1.2 CONSULTATION. The Construction Manager shall schedule and conduct regular meetings with the Owner and Design Professional. The Construction Manager shall schedule additional meetings upon the Owner's request. The Construction Manager shall consult with the Owner and Design Professional regarding Worksite use and improvements,

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and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on: construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials.

**3.1.3 CONSTRUCTION SCHEDULE.** When Project requirements have been sufficiently identified, including those identified in Subparagraph 3.1.8, the Construction Manager shall prepare a preliminary Construction Schedule for the Design Professional's review and the Owner's approval. The Construction Schedule shall show the critical path and be based on the critical path method. The Construction Manager shall coordinate and integrate the Construction Schedule with the services and activities of the Owner, Construction Manager, and Design Professional, and the requirements of governmental entities. As design proceeds and following each approval of schematic design documents, design development documents and Construction Documents, the Construction Manager shall update the Construction Schedule, for the Owner's approval, to indicate proposed activity sequences, durations, or milestone dates for such activities as receipt and approval of pertinent information, issuance of the Construction Documents, the preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements and, estimated Date of Substantial Completion of the Project, and the Date of Final Completion of the Project. If Construction Schedule updates indicate that milestone dates contained in prior Construction Schedules will not be met, the Construction Manager shall notify and make recommendations to the Owner. If the Project is to be completed in phases, the Construction Manager shall make recommendations to the Owner and Design Professional regarding the phased issuance of Construction Documents.

#### **3.1.4 BUDGETS**

**3.1.4.1** When the Owner has sufficiently defined the Owner's Program and other Project requirements and the Design Professional has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Design Professional and approval of the Owner, a preliminary estimate for the Project, utilizing area, volume or similar conceptual estimating techniques. The Construction Manager shall provide for in such preliminary estimate the further development of the design consistent with the Owner's Program.

**3.1.4.2** When schematic or preliminary design documents have been completed by the Design Professional and approved by the Owner, the Construction Manager shall prepare for the review of the Design Professional and approval of the Owner, a more detailed estimate with supporting data including, where possible, data from the construction industry. During the preparation of the design development documents or documents of comparable detail, the Construction Manager shall update and refine this budget at appropriate intervals agreed upon by the Owner and Construction Manager.

**3.1.4.3** When design development documents or documents of comparable detail have been completed by the Design Professional and approved by the Owner, the



Construction Manager shall prepare a further detailed estimate with supporting data from the construction industry for review by the Design Professional and approval by the Owner. During the preparation of the Construction Documents, the Construction Manager shall update and refine this budget at appropriate intervals agreed upon by the Owner and Construction Manager.

3.1.4.4 When the Owner and Construction Manager agree the Construction Documents are sufficiently complete, the Construction Manager shall prepare and submit to the Owner and the Design Professional in writing a Construction Budget including supporting data from the construction industry. The Construction Manager will also aid the Design Professional in calculating the "estimated total cost of a public improvement" set forth in Iowa Code Section 26.2.

3.1.4.5 As the Construction Documents may not be completed at the time the Construction Budget is prepared, the Construction Manager shall provide in the Construction Budget for further development of the Construction Documents consistent with the then-current Construction Documents.

3.1.4.6 The Construction Manager shall meet with the Owner and Design Professional to review the Construction Budget. In the event that the Owner or Design Professional discover any inconsistencies, inaccuracies or omissions in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Construction Budget. The Owner shall then give prompt written approval of the Construction Budget.

3.1.4.7 The Owner shall cause the Design Professional, consistent with professional standards, to revise the Construction Documents to the extent necessary to reflect the clarifications, assumptions and allowances on which the Construction Budget is based. Revised Construction Documents shall be furnished to the Construction Manager in accordance with the current Construction Schedule, unless otherwise agreed upon by the Owner, Construction Manager and Design Professional. The Construction Manager shall promptly notify the Owner and Design Professional if the revised Construction Documents are inconsistent with the Construction Budget's clarifications, assumptions and allowances.

3.1.4.8 If any estimate or Construction Budget submitted to the Owner exceeds previously approved amounts, the Construction Manager shall notify and make recommendations to the Owner.

3.1.5 CONSTRUCTION DOCUMENT REVIEW. The Construction Manager shall review the Construction Documents in an effort to identify potential constructability problems, including interfaces between different elements of the Work that could impact the Trade Contractors' ability to perform the Work within the Construction Budget. Based upon its review of the Construction Documents, the Construction Manager shall issue a report to the Design Professional and Owner for their review and action as appropriate. In addition, the Construction Manager shall promptly report to the Owner and the Design Professional any errors or omissions which it discovers in the Construction Documents.

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3.1.6 TEMPORARY FACILITIES. The Construction Manager shall make recommendations regarding temporary construction facilities, equipment, materials and services for common use by Trade Contractors.

3.1.7 LONG-LEAD-TIME ITEMS. The Construction Manager shall recommend to the Owner and the Design Professional a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Construction Schedule. The Construction Manager shall help expedite the delivery of long-lead-time items.

3.1.8 DIVISION OF THE WORK. The Construction Manager shall make recommendations regarding the division of the Work into Trade Contractor bid packages.

3.1.9 SOLICITATION OF TRADE CONTRACTORS AND SUPPLIERS. The Construction Manager shall make recommendations regarding the method to be used for selection of Trade Contractors and award of Trade Contracts. The Construction Manager shall assist the Owner in determining whether to require surety bonding from Trade Contractors. The Construction Manager should be familiar with the competitive bidding requirements for public improvement projects set forth in Iowa law. The Construction Manager will assist the Owner procuring construction contracts in accordance with Iowa law.

3.1.10 AWARD OF TRADE CONTRACTOR AGREEMENTS. The Owner will procure construction contracts in accordance with Iowa law. The Construction Manager shall assist the Owner with procurement as needed. At Owner's request, the Construction Manager shall attend and assist with any bid openings conducted by the Owner. Further, the Construction Manager shall analyze bid's responsiveness and the bidders for responsibility in accordance with Iowa law and make recommendations to Owner based on said analysis.

3.1.11 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION. The Construction Manager shall consult with the Owner regarding equal employment opportunity and affirmative action programs.

3.1.12 CONSULTANTS. The Construction Manager shall advise and assist the Owner in determining the need for, selecting, retaining and coordinating the professional services of a surveyor, testing laboratories, geotechnical engineer, construction materials testing, environmental testing, and special consultants as needed.

3.1.12.1 The Construction Manager shall not engage the services of any consultant without first obtaining the Owner's written approval. Such approval by the Owner shall not be deemed to create any contractual relationship between the Owner and any such consultant, except that the Owner shall be considered the intended beneficiary of the performance of their services. The Construction Manager shall not include any limits of liability in its agreements with any consultants without the prior written approval of the Owner. The Construction Manager shall bind its consultants in the same manner as the Construction Manager is bound to the Owner under this Agreement.

3.1.13 PERMITS. The Construction Manager shall advise and assist the Owner in obtaining building permits and special permits for permanent improvements, except for permits required to be obtained directly by the various Trade Contractors.

## 3.2 CONSTRUCTION PHASE SERVICES

### 3.2.1 GENERAL

3.2.1.1 The construction phase shall commence on the earlier of:

- a. the Owner's first award of a Trade Contract Agreement, or
- b. the Owner's first authorization for the Construction Manager to undertake General Conditions Items.

3.2.1.2 If the Owner and Construction Manager agree, after consultation with the Design Professional, the construction phase may commence before the preconstruction phase is completed, in which case both phases will proceed concurrently.

### 3.2.2 ADMINISTRATION

3.2.2.1 The Construction Manager shall assist the Owner in preparing and entering into Trade Contracts, and advise the Owner on the acceptability of subcontractors and suppliers proposed by Trade Contractors. All Trade Contracts shall be between the Owner and the Trade Contractors. The terms and conditions of the Trade Contracts shall not conflict with this Agreement.

3.2.2.2 The Construction Manager shall establish an onsite organization and lines of authority to administer the Project. The Construction Manager shall schedule and conduct meetings at which the Owner, Construction Manager, Design Professional and appropriate Trade Contractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.

3.2.2.3 The Construction Manager shall provide monthly written reports to the Owner and Design Professional on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Trade Contractors working on the Worksite, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Design Professional.

3.2.2.4 The Construction Manager shall assist the Owner and the Design Professional in the review, evaluation and documentation of claims by Trade Contractors, including but not limited to delay and acceleration claims.

3.2.2.5 The Construction Manager shall maintain on a current basis at the Worksite records of all Trade Contracts, Construction Documents, samples, purchases, materials, equipment, maintenance and operating manuals and instructions, and other construction-related documents, including all revisions. The Construction Manager shall obtain data from Trade Contractors and maintain a current set of record drawings, specifications and operating manuals and, at the completion of the Project, deliver all such records to the Owner.

3.2.2.6 The Construction Manager shall monitor and coordinate the Trade Contractors, and if necessary, shall have the right to change the time, order and priority in which the various portions of the Work are to be performed.

3.2.2.7 Under no circumstances shall the Construction Manager instruct Trade Contractors on the means and methods of constructing the Project.

3.2.3 CONSTRUCTION SCHEDULE. Utilizing the construction schedules or other information provided by the Trade Contractors, the Construction Manager shall update the Construction Schedule incorporating the activities of the Trade Contractors on the Project. If the construction schedules or other information provided by the Trade Contractors indicate that milestone dates contained in prior Construction Schedules will not be met, the Construction Manager shall notify and make recommendations to the Owner. The Construction Manager shall (a) monitor the performance of the Trade Contractors as it relates to the Construction Schedule, (b) update the Construction Schedule and (c) if required, recommend corrective alternatives or adjustments to the Owner or Trade Contractors.

#### 3.2.4 MONITORING THE CONSTRUCTION BUDGET

3.2.4.1 The Construction Manager shall develop and implement a detailed system of cost monitoring that will provide the Owner with timely information as to the anticipated total cost of the Project including changes in the Work or services and the cost of the following additional items:

- Land Purchase/Financing
- Marketing
- Permitting
- Geotechnical services
- Design services
- Commissioning
- Furniture, Fixtures and Equipment (FF&E)
- Special Inspections
- Move Services

The cost monitoring system shall track the Construction Budget as it is updated from time to time, and compare it with the actual cost for Work in progress and estimates for uncompleted Work including proposed changes. This information shall be reported to the Owner in writing at mutually agreeable intervals. The

Construction Manager shall advise the Owner whenever projected costs exceed budgeted amounts and recommend corrective alternatives or adjustments.

3.2.4.2 The Construction Manager shall maintain cost accounting records on Work performed under unit costs, actual costs for labor and materials, or other similar methods; afford the Owner access to these records; and preserve them for a period of five (5) years after final payment.

3.2.4.3 The Construction Manager shall:

- a. develop and implement a procedure for the preparation, review and processing of change orders to the Trade Contracts;
- b. recommend to the Owner and the Design Professional necessary or desirable changes to the Trade Contracts;
- c. review, evaluate and make recommendations regarding Trade Contractor requests for changes; and
- d. assist in preparing, negotiating and documenting Trade Contract Change Orders.

3.2.4.4 Records of Reimbursable Costs and costs pertaining to services performed on the basis of a multiple of Direct Personnel Expense shall be kept on the basis of generally accepted accounting principles and must conform to applicable State of Iowa accounting rules, procedures and requirements.

3.2.5 PAYMENT PROCEDURES. The Construction Manager shall develop and implement a procedure for the review and processing of monthly applications by Trade Contractors for progress and final payments, including the receipt of appropriate lien and claim waivers from Trade Contractors. The procedure must include the Design Professional in the manner set forth in Iowa law. Based on the Construction Manager's onsite observations of the Work and review of the Trade Contractors' payment applications, the Construction Manager shall recommend amounts due the respective Trade Contractors.

3.2.5.1 The recommendation for payment of a Trade Contractor's application for payment shall not be a representation that the Construction Manager has:

- a. made exhaustive or continuous onsite visits to check the quality or quantity of the Work;
- b. reviewed construction means, methods, techniques, sequences or procedures for the Trade Contractor's Work;
- c. reviewed copies of requisitions received from subcontractors and material suppliers and other data requested by the Owner to substantiate the Trade Contractor's right to payment; or

d. ascertained how or for what purpose the Trade Contractor has used money previously paid. The Construction Manager shall be entitled to rely on the Trade Contractor's certification as to the application of money previously paid.

3.2.5.2 The recommendation for payment of a Trade Contractor's application for payment shall constitute a representation by Construction Manager to the Owner, based on its observations at the Worksite and the data comprising each Trade Contractor's application for payment, that the Work has progressed to the point indicated; that to the best of its knowledge, information and belief, the quality of the Work is in accordance with the Construction Documents (subject to an evaluation of the Work for conformance with the Construction Documents upon Substantial Completion, to the result of any subsequent test required by or performed under the Construction Documents, to minor deviations from the Construction Documents correctable prior to completion, and to any specific qualification stated in writing by Construction Manager); and the Construction Manager believes that the Trade Contractor is entitled to payment in the amount certified. The Owner will not be bound by the amount stated in the Construction Manager's recommendation for Payment in making determinations of amounts properly payable to the Trade Contractor.

3.2.6 REVIEW OF DESIGN PROFESSIONAL PAYMENT. The Construction Manager shall develop and implement a procedure for the review of Design Professional applications for payment and shall provide to the Owner a recommendation concerning payment.

### 3.2.7 REVIEW OF TRADE CONTRACTORS' WORK

3.2.7.1 The Construction Manager shall determine in general whether the Work is being performed in accordance with the requirements of the respective Trade Contracts, endeavoring to guard the Owner against defects and deficiencies in the Work. As appropriate, the Construction Manager shall have authority, upon written authorization from the Owner, to require additional inspection or testing of the Work in accordance with the provisions of the Trade Contracts, whether or not such Work is fabricated, installed or completed. The Construction Manager, in consultation with the Design Professional, may, upon written authorization from the Owner, reject work which does not conform to the requirements of the Trade Contracts.

3.2.7.2 The Construction Manager shall refer all questions for interpretation of the documents prepared by the Design Professional to the Design Professional and shall not approve payment for work rejected by the Design Professional or a building code official as noncompliant with Construction Documents, including but not limited to, designs and technical submissions, or applicable federal, state, or local building codes.

3.2.7.3 With respect to each Trade Contractor's own Work, the Construction Manager will not be responsible for and will not have control or charge of construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and it will not be responsible



for the Trade Contractor's failure to carry out the Work in accordance with the Construction Documents. Construction Manager will not be responsible for or have control or charge over the acts or omissions of the Design Professionals, Trade Contractors or any of their agents or employees, or of any other person performing any of the Work.

**3.2.8 REVIEW OF SAFETY PROGRAMS.** The Construction Manager shall review the safety programs developed by each of the Trade Contractors for purposes of coordinating the safety programs with those of the other Trade Contractors. The Construction Manager's responsibilities for coordination of safety programs shall not extend to direct control over or charge of, the acts or omissions of the Trade Contractors, or the subcontractors, agents or employees of the Trade Contractors or any other persons performing portions of the Work and not directly employed by the Construction Manager, nor shall it relieve the Trade Contractor of its obligations, duties and responsibilities for safety. Notwithstanding the foregoing, if the Construction Manager deems any part of the Work or Worksite unsafe, the Construction Manager, without assuming responsibility for the Trade Contractor's safety program, may require the Trade Contractor to stop performance of the Work or take corrective measures satisfactory to the Construction Manager.

**3.2.9 SHOP DRAWINGS AND SAMPLES.** The Construction Manager, in collaboration with the Design Professional, shall establish and implement procedures for expediting the processing and approval of shop drawings and samples.

#### **3.2.10 PROJECT CLOSEOUT**

**3.2.10.1** The Construction Manager shall advise the Owner as to the Date of Substantial Completion of the Work or designated portions thereof, and assist the Design Professional in preparing a list of incomplete or unsatisfactory items and a proposed schedule for their completion.

**3.2.10.2** The Construction Manager, with the Owner's maintenance personnel, shall direct the checkout of utilities, operations systems and equipment for readiness and assist in their initial start-up testing by the Trade Contractors.

**3.2.10.3** The Construction Manager shall advise the Owner as to the Final Completion of the Work and provide written notice to the Owner and Design Professional that the Work is ready for final inspection.

**3.2.10.4** The Construction Manager shall collect and deliver to the Owner the guarantees, affidavits, releases, bonds and waivers from Trade Contractors and any keys, manuals, record drawings and maintenance stocks the Construction Manager receives from the Trade Contractors.

**3.2.11 CORRECTION PERIOD SERVICES.** The Construction Manager shall make visits to the Worksite during the Trade Contractors' one-year correction period to assist the Owner in evaluating the need for corrective measures.

3.3 ADDITIONAL SERVICES. The Construction Manager shall provide additional services, above and beyond those agreed to under the terms of this Agreement, upon the request of the Owner. A written agreement between the Owner and Construction Manager shall define the extent of such additional services and the amount and manner in which the Construction Manager shall be compensated for such additional services. Reference in this section to any type of service as an additional service shall not be construed to limit or change the compensation for any of the Services included in this Agreement. Additional services may include, but are not limited to, the following.

3.3.1 Development of the Owner's Program, assistance in establishing an overall budget for the Project, investigating sources of financing, general business planning and other information and documentation as may be required to establish the feasibility of the Project.

3.3.2 Consultations, negotiations, and documentation supporting the procurement of Project financing.

3.3.3 Surveys, Site evaluations, legal descriptions and aerial photographs.

3.3.4 Appraisals of existing equipment, existing properties, new equipment and developed properties.

3.3.5 Consultations and representations before governmental authorities or others having jurisdiction over the Project other than normal assistance in securing building permits.

3.3.6 Artistic renderings, models and mockups of the Project or any part of the Project or the Work.

3.3.7 Inventories of existing furniture, fixtures, furnishings and equipment which might be under consideration for incorporation into the Work.

3.3.8 Interior design and related services including procurement and placement of furniture, furnishings, artwork and decorations.

3.3.9 Services related to construction performed by the Owner.

3.3.10 Design, coordination, management, expediting and other services supporting the procurement of materials to be obtained, or work to be performed, by the Owner, including but not limited to telephone systems, computer wiring networks, sound systems, alarms, security systems and other specialty systems which are not a part of the Work.

3.3.11 Estimates, proposals, appraisals, consultations, negotiations and services in connection with the repair or replacement of an insured loss.

3.3.12 Services for tenant or rental spaces not a part of this Agreement.

3.3.13 Finding housing for construction labor, and defining requirements for establishment and maintenance of such housing.

3.3.14 Repairing, replacing, correcting or completing defective or incomplete Work that the Construction Manager has undertaken in place of a Trade Contractor.

3.3.15 Obtaining soils, subsurface and environmental studies, reports and investigations required for submission to governmental authorities or others having jurisdiction over the Project.

3.3.16 Services requested by the Owner or required by the Work which are not specified in the Contract Documents and which are not normally part of generally accepted construction management practice.

3.3.17 Serving or preparing to serve as an expert witness on behalf of the Owner in connection with any proceeding, legal or otherwise, regarding the Project.

3.3.18 Providing services relating to Hazardous Material discovered at the Worksite.

3.3.19 Nothing in this subsection shall authorize Construction Manager to directly perform or perform through subcontractors additional services that require licensure under Iowa law without proper licensure, including but not limited to licensure as a registered architect (Iowa Code chapter 544A), registered landscape architect (Iowa Code chapter 544B), licensed professional engineer or licensed professional land surveyor (Iowa Code chapter 542B), certified real estate appraiser (Iowa Code chapter 543D), or certified groundwater professional (Iowa Code chapter 455G).

3.4 CONSTRUCTION MANAGER'S REPRESENTATIVE. The Construction Manager's authorized Representative is "**CM Representative's Name**". The Construction Manager's representative shall possess full authority to receive instructions from the Owner and to act on those instructions. The Construction Manager shall notify the Owner in writing of a change in the designation of the Construction Manager's representative. Unless agreed to by the Parties in an exhibit attached hereto, the Construction Manager's representative is also authorized to bind the Construction Manager in all matters relating to this Agreement including, without limitation, all matters requiring the Construction Manager's approval, authorization, or written notice. The Construction Manager's representative is also authorized to resolve disputes in accordance with Section 12 of this Agreement.

3.4.1 Construction Manager staff assignments shall be per Construction Manager's RFP response dated September 28, 2015. Any staff assignment changes must be approved in writing by the State of

#### Iowa.**ARTICLE 4**

### **OWNER'S RESPONSIBILITIES**

#### 4.1 INFORMATION AND SERVICES

4.1.1 FULL INFORMATION. Any information or services to be provided by the Owner shall be provided in a reasonably timely manner, so as not to delay the Construction Manager's services.

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4.1.2 WORKSITE INFORMATION. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely on Worksite information furnished by the Owner pursuant to this Paragraph 4.1.2. To the extent the Owner has obtained, or is required elsewhere in the Agreement to obtain, the following Worksite information, the Owner shall provide at the Owner's expense and with reasonable promptness:

4.1.2.1 information describing the physical characteristics of the Worksite, including surveys, Worksite evaluations, legal descriptions, data or drawings depicting existing conditions, subsurface conditions and environmental studies, reports and investigations;

4.1.2.2 tests, inspections and other reports dealing with environmental matters, Hazardous Material and other existing conditions, including structural, mechanical and chemical tests, required by the Construction Documents or by law; and

4.1.2.3 any other information or services reasonably requested by the Construction Manager which are necessary to the Construction Manager's performance of the Work and under the Owner's control.

4.1.3 The information required by Paragraph 4.1.2 shall be provided in reasonable detail. Legal descriptions shall include easements, title restrictions, boundaries, and zoning restrictions. Worksite descriptions shall include existing buildings and other construction and all other pertinent Site conditions. Adjacent property descriptions shall include structures, streets, sidewalks, alleys, and other features relevant to the Work. Utility details shall include available services, lines at the Worksite and adjacent and connection points. The information shall include public and private information, subsurface information, grades, contours, and elevations, drainage data, exact locations and dimensions, and benchmarks that can be used in laying out the Work. The Construction Manager shall in writing request from the Owner any information identified in Paragraph 4.1.2 and its subparts that the Construction Manager believes the Owner has obtained but has not provided to the Construction Manager.

4.2 OWNER'S REPRESENTATIVE. The Owner's representative is "Owner's Representative's Name". The representative shall be fully acquainted with the Project; shall furnish the information and services required of the Owner pursuant to Paragraph 4.1 so as not to delay the Construction Manager's services or the Work; and to the extent permitted by Iowa law shall have authority to bind the Owner in all matters relating to this Agreement including, without limitation, all matters requiring the Owner's approval, authorization or written notice. If the Owner changes its representative as listed above, the Owner shall notify the Construction Manager in advance in writing. To the extent permitted by Iowa law, the Owner's Representative is also authorized to resolve disputes in accordance with Section 12 of this Agreement.

#### 4.3 ADDITIONAL REQUIREMENTS

4.3.1 APPROVALS. The Owner shall secure and pay for necessary approvals, easements, rights of way, assessments and charges required for the construction, use or occupancy of the Project.

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4.3.2 ANCILLARY SERVICES. The Owner shall furnish accounting, auditing and insurance services necessary to complete the Project.

4.3.3 CONSTRUCTION DOCUMENTS. The Construction Manager shall be furnished without charge all copies of drawings, specifications and other Construction Documents reasonably necessary for the execution of the services. If the Owner becomes aware of any fault or defect in the Project or nonconformance with the Construction Documents, prompt written notice shall be given to the Construction Manager.

4.3.4 COMMUNICATIONS. The Owner shall endeavor, but is not obligated, to communicate with Trade Contractors through the Construction Manager. If the Owner needs to communicate directly with a Trade Contractor, the Owner shall notify the Construction Manager in writing of such communication in a timely manner.

4.3.5 PERMITS. The Owner shall obtain all permits and licenses which are necessary for the performance of the Work and the services, except where such permits or licenses are the responsibility of the Construction Manager, Design Professionals, Trade Contractors or Others.

4.3.6 COORDINATION OF OWNER WORK The Owner shall provide interface with and coordination of all work which is being performed by the Owner or separate contractors acting with express written authorization of the Owner. This does not include work performed by Trade Contractors.

4.3.7 REVIEW AND APPROVAL. The Owner shall promptly furnish all reviews, approvals or other appropriate action to the extent required by this Agreement with respect to all samples, estimates, schedules, budgets, shop drawings, Trade Contracts, purchase orders, contracts, and other items submitted or proposed by the Construction Manager.

#### 4.4 HAZARDOUS MATERIALS

4.4.1 NOTIFICATION. If at any time prior to the commencement of or during the progress of the Work, the Owner is aware of the presence of any Hazardous Material at the Project Site, it shall promptly notify the Construction Manager in writing of the presence, location and composition of the Hazardous Material.

4.4.2 DISCOVERY. If any known or suspected Hazardous Material is discovered at the Project Site, the Construction Manager shall immediately direct Trade Contractors to stop work in the immediate area of the condition and the Construction Manager shall report the condition to the Owner.

4.4.3 REMEDIATION. The Owner shall be solely responsible for corrective measures or remedial action. The Construction Manager shall not be required to resume its services prior to receipt of certification by a mutually agreeable independent laboratory and approval by the appropriate government authority that the Hazardous Material has been removed or rendered harmless.

## **ARTICLE 5 TRADE CONTRACTS**

5.1 TRADE CONTRACTS. The Owner shall provide the Construction Manager with copies of all executed Trade Contracts. The Owner shall ensure that each Trade Contract:

5.1.1 requires the Trade Contractors to cause their insurers to waive all rights of subrogation against the Owner, Construction Manager, Design Professional, their agents, employees, consultants and assigns, for all damages in connection with the Project which are covered by required insurance except such rights as they may have to the proceeds of such insurance held by the Owner or Construction Manager as trustees.

5.1.2 contains an indemnification obligation clause similar to that specified in Paragraph 10.1.

5.1.3 provides that the Construction Manager is authorized to assist the owner in soliciting, awarding and administering the Trade Contracts and is acting on behalf of the Owner in that capacity.

5.1.4 requires the Trade Contractor to name the Construction Manager as an additional insured under the Trade Contractor's commercial general liability coverage, with such coverage being primary and non-contributing with any other insurance available to the Construction Manager.

5.2 EXTENT OF TRADE CONTRACTS. Trade Contracts shall be directly between the Owner and the Trade Contractors. The Construction Manager shall not have any liability for or responsibility under any Trade Contract executed by the Owner, except to the extent specified in this Agreement or as otherwise agreed to between the Owner and Construction Manager in writing.

## **ARTICLE 6 WARRANTY AND CORRECTION OF INCIDENTAL CONSTRUCTION**

6.1 To the extent the Construction Manager performs any incidental construction work through the provision of General Condition Items for the Project, the Construction Manager warrants that all materials and equipment shall be new unless otherwise specified, of good quality, in conformance with the Construction Documents, free from defective workmanship and materials and complies with all applicable building codes. The Construction Manager further warrants that such incidental construction work shall be free from material defects not intrinsic in the design or materials required in the Construction Documents.

6.1.1 If, prior to the Date of Substantial Completion or within one year after the Date of Substantial Completion of the Work, any portion of the incidental construction work is found to be not in conformance with the Construction Documents, the Owner shall promptly notify the Construction Manager in writing. Unless the Owner provides written acceptance of the condition, the Construction Manager shall promptly correct the defective incidental construction work at its own cost and time and bear the expense of

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additional services required for correction of any defective incidental construction work for which it is responsible.

6.1.2 The Construction Manager's warranty does not include remedies for defects or damages caused by normal wear and tear during normal usage, use for a purpose for which the Project was not intended, improper or insufficient maintenance, modifications performed by the Owner or others, or abuse. The Construction Manager's warranty pursuant to this Paragraph 6.1 shall commence on the Date of Substantial Completion.

## **ARTICLE 7 CONSTRUCTION MANAGER'S COMPENSATION**

7.1 COMPENSATION. The compensation to be paid to the Construction Manager shall be as set forth in this Article. This Agreement contemplates that the Construction Manager shall perform services in connection with more than one Project. Construction Manager shall be paid for each Project separately as such Project reaches the phases of completion entitling the Construction Manager to payment as set forth in this Article and each applicable Project Specific Exhibit.

### **7.2 COMPENSATION FOR PRECONSTRUCTION PHASE SERVICES**

7.2.1 FEE. For services performed during the preconstruction phase, subject to the terms of this Agreement and applicable law and State accounting practices and procedures, the Owner shall pay the Construction Manager a Fee of:

There is no fee, per se, for Preconstruction Services.

7.2.2 REIMBURSABLE COSTS. During the preconstruction phase, the Owner shall pay the Construction Manager the Reimbursable Costs set forth in Article 8.

### **7.3 COMPENSATION FOR CONSTRUCTION PHASE SERVICES**

7.3.1 FEE. For services performed during the construction phase, the Owner shall pay the Construction Manager a Fee according to the schedule below:

<b>Construction Cost (\$)</b>	<b>Percent Fee (%)</b>
<b>\$0 - \$500,000</b>	Encumbered Hourly Rate (No Fee)
<b>\$501,000 - \$2,000,000</b>	5% Fee
<b>\$2,000,001 - \$5,000,000</b>	4% Fee
<b>\$5,000,001 - \$10,000,000</b>	3% Fee
<b>&gt; \$10,000,001</b>	Selection of CM Through Public RFP

7.3.2 REIMBURSABLE COSTS. During the construction phase, the Owner shall pay Construction Manager the Reimbursable Costs set forth in Article 8. Such Reimbursable Costs are in addition to the Fee.

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## 7.4 COMPENSATION FOR GENERAL CONDITIONS ITEMS

7.4.1 FEE. If the Construction Manager provides General Conditions Items pursuant to Subparagraph 2.4.11, the Owner shall pay the Construction Manager for such services a Fee set forth in Article 8.

7.4.2 REIMBURSABLE COSTS. For General Conditions Items provided pursuant to Subparagraph 3.2.11, the Owner shall pay the Construction Manager the Reimbursable Costs set forth in Article 8. Such Reimbursable Costs are in addition to the Fee.

7.5 ADJUSTMENTS. Construction Manager may request that its compensation be equitably adjusted upon the occurrence of any event or circumstance beyond the reasonable control of the Construction Manager, including but not limited to force majeure, altering the cost of or time required for performance of the Construction Manager's services. Construction Manager must provide written notice to the Owner, promptly after it becomes aware of it, of the justification for such equitable adjustment. Such request will be granted if, in the reasonable opinion of the Owner, the events described in the Construction Manager's notice were beyond the control of the Construction Manager and increased the cost required for the performance of its services in the amount requested by the Construction Manager. Additionally, before any increase in payment may be made the Agreement must be modified to reflect the reason for the increase and the amount of the increase. Disputes regarding requests made under this section will be resolved according to the dispute resolution procedures set forth in Article 12 of this Agreement.

7.6 LICENSURE REQUIRED FOR PAYMENT Notwithstanding anything herein to the contrary, Construction Manager shall not be compensated in any way for work performed or services provided under the Agreement that require licensure under the laws of the State of Iowa and that were performed or provided without proper licensure.

## ARTICLE 8 REIMBURSABLE COSTS

8.1 REIMBURSABLE COST ITEMS. The Construction Manager's Reimbursable Costs must conform to and be documented in accordance to applicable State of Iowa accounting rules, practices, procedures and requirements. Reimbursable Costs shall be particularly specified in this Article. Costs not particularly specified in this Agreement as reimbursable costs are not reimbursable.

8.1.1 STAFF Actual wages, salaries and other compensation, or amounts calculated under a salary or wage schedule.

DIRECT PERSONNEL EXPENSES Compensation agreed upon by the Owner and the Construction Manager, for the employees of the Construction Manager when (a) employed at the Project Site, in whatever capacity, (b) engaged on the road expediting the production or transportation of material and equipment and otherwise performing services and (c) performing the functions listed below identified in this Agreement from a principal or branch office of the Construction Manager.

<u>Sample Positions</u>	<u>Unencumbered</u>	<u>Encumbered</u>
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Division Manager	Hourly Rate	Hourly Rate including O&P
Mechanical Specialist	Hourly Rate	Hourly Rate including O&P
Sr. Preconstruction Manager	Hourly Rate	Hourly Rate including O&P
Sr. Project Manager	Hourly Rate	Hourly Rate including O&P
Project Manager II	Hourly Rate	Hourly Rate including O&P
Estimator	Hourly Rate	Hourly Rate including O&P
Project Manager I	Hourly Rate	Hourly Rate including O&P
Project Engineer	Hourly Rate	Hourly Rate including O&P
Project Assistant	Hourly Rate	Hourly Rate including O&P
Field Coordinator	Hourly Rate	Hourly Rate including O&P
Sr. Superintendent	Hourly Rate	Hourly Rate including O&P
Superintendent	Hourly Rate	Hourly Rate including O&P
Assistant Superintendent	Hourly Rate	Hourly Rate including O&P

8.1.2 PAYROLL TAXES AND BENEFITS Cost of payroll taxes and insurance, and all employee benefits and contributions including, without limitation, unemployment insurance, Workers' Compensation insurance, FICA, health insurance, sick leave, holidays, vacation, pensions, and retirement contributions, insofar as the amount thereof is based on the wages, salary or other compensation paid to the employees of the Construction Manager referred to in Subparagraphs 8.1.1 and 8.1.2.

8.1.3 TRAVEL The proportion of reasonable transportation, traveling, moving, food, lodging and per diem expenses of the Construction Manager or of its officers or employees incurred in performance of the services. Reimbursement for transportation, travel, food, and lodging shall be subject to the limits applicable to Board, Commission, Advisory Council, and Task for Members of State Government per State Accounting Enterprise Procedure No. 210-245.

8.1.4 GENERAL CONDITION ITEMS All costs and expenses related to General Condition Items. General Conditions items will be reimbursed at the actual cost with backup documentation not to exceed the following rate schedule:

Sample Items	Rate
Jobsite Trailer Rental	Rate Per Month
Office Trailer Setup/Demobilization	Lump Sum Cost
Copier/Scanner	Rate Per Month

8.1.4.1 Other General Conditions items such as but not limited to office supplies, internet connectivity connection installation, internet connection monthly fee, safety supplies, drinking water, plan printing, construction dumpster fees, and chemical toilets will be reimbursed with prior owner approval as individual expenses with back up documentation on a monthly basis per State of Iowa Accounting Code. The cost of General Liability insurance has been incorporated into the Construction Manager's fee and will not be a reimbursable cost.

## ARTICLE 9 PAYMENTS TO THE CONSTRUCTION MANAGER

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9.1 MONTHLY STATEMENTS. Construction Manager shall submit a monthly invoice to the Owner requesting payment of the fees or other compensation specified therein. All invoices submitted by Construction Manager shall comply with all applicable rules concerning payment of such fees, charges or other claims and shall contain appropriate documentation as necessary to support the fees or charges included on the invoice and all information reasonably requested by the Owner. The Owner shall pay all approved invoices in arrears and in conformance with Iowa Code section 8A.514 and 11 Iowa Admin. Code 41.1(2). The Owner may pay in less than sixty (60) days, as provided in Iowa code section 8A.514. However, an election to pay in less than sixty (60) days shall not act as an implied waiver of Iowa Code section 8A.514. Notwithstanding anything herein to the contrary, the Owner shall have the right to dispute any invoice submitted for payment and withhold payment of any disputed amount if the Department believes the invoice is inaccurate or incorrect in any way.

9.2 FINAL PAYMENT. Final payment including any unpaid balance of the Construction Manager's compensation shall be due and payable when the Project is delivered to the Owner, ready for beneficial occupancy, or when the Owner occupies the Project, or when the services are complete, whichever event last occurs, unless otherwise agreed to by the Parties in writing.

9.2.1 Prior to final payment to the Construction Manager, the Construction Manager shall furnish evidence satisfactory to the Owner that there are no claims, obligations or liens outstanding in connection with its Services. Acceptance of final payment shall constitute a waiver of all claims by the Construction Manager for compensation for its Services.

9.2.2 Should there be any claim, obligation or lien asserted before or after final payment is made that arises from the negligent performance of the Construction Manager's Services, the Construction Manager shall reimburse the Owner for any costs and expenses, including attorneys' fees, costs and expenses, incurred by the Owner in satisfying, discharging or defending against any such claim, obligation or lien, including any action brought or judgment recovered, provided the Owner is making payments or has made payments to the Construction Manager in accordance with the terms of this Agreement.

9.3 SUSPENSION. If the Owner should fail to pay the Construction Manager for any non-disputed payments within the time period required by Iowa law and Section 9.1 of this Agreement, then the Construction Manager may, upon seven (7) additional Days' written notice to the Owner, stop performing services until payment of the amount owing has been received.

9.4 LATE PAYMENT. Non-disputed payments due but unpaid shall bear interest from the date sixty (60) days following the receipt of an appropriate pay application.

## **ARTICLE 10 INDEMNITY, INSURANCE AND WAIVERS**

### **10.1 INDEMNITY**

10.1.1 CONSTRUCTION MANAGER'S INDEMNITY. The Construction Manager agrees to indemnify and hold harmless the Owner, the State of Iowa, and its officers, appointed and elected officials, board and commission members, employees, volunteers and agents (collectively the "Indemnified Parties"), from any and all costs, expenses, losses, claims, damages, liabilities, settlements and judgments (including, without limitation, the reasonable value of the time spent by the Attorney General's Office, and the costs, expenses and attorneys' fees of other counsel retained

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by the Indemnified Parties directly or indirectly related to, resulting from, or arising out of this Agreement, including but not limited to any claims related to, resulting from, or arising out of:

10.1.1.1 Any breach of this Agreement

10.1.1.2 Any negligent, intentional or wrongful act or omission of the Construction Manager or any agent or subcontractor utilized or employed by the Construction Manager;

10.1.1.3 The Construction Manager's performance or attempted performance of this Agreement, including any agent or subcontractor utilized or employed by the Construction Manager;

10.1.1.4 Failure by Construction Manager, including any agent or subcontractor utilized or employed by the Construction Manager, to comply with any applicable local, state, and federal laws, rules, ordinances and regulations;

10.1.1.5 Any failure by the Construction Manager, including any agent or subcontractor utilized or employed by the Construction Manager, to make all reports, payments and withholdings required by federal and state law with respect to social security, employee income and other taxes, fees or costs required by the Construction Manager to conduct business in the State of Iowa;

10.1.1.6 Any claim of misappropriation of trade secret or infringement or violation of any intellectual property rights, proprietary rights or personal rights of any third party, including any claim that any deliverable or any use thereof (or the exercise of any rights with respect thereto) infringes, violates or misappropriates any patent, copyright, trade secret, trademark, trade dress, mask work, utility design, or other intellectual property right or proprietary right of any third party.

10.1.1.7 Any claim for violation or infringement of any statutory or common law rights or any other rights of any person or entity, including, without limitation, any claims or causes of action involving torts, personal injury, defamation, or rights of publicity, privacy, confidentiality, misappropriation or security.

10.1.2 OWNER'S INDEMNITY The Owner shall, only to the extent consistent with and permitted by Article VII, Section 1 of the Iowa Constitution and Iowa Code Chapter 669, indemnify the Construction Manager from and against any claim, as defined in Iowa Code Section 669.2, caused directly by the negligent or wrongful acts or omissions of any employee of the State while acting within the scope of the employee's office or employment in connection with the performance of this Agreement. Construction Manager agrees that any claim for which indemnification is sought pursuant to this Section will be subject to the provisions of Iowa Code Chapter 669 and 543 Iowa Admin. Code 1, including, without limitation, those provisions which address the making and filing of claims. If the Owner makes any indemnity payments to the Construction Manager pursuant to this Section and the Construction Manager thereafter collects or recovers all or a portion of such amounts from any person or third party, including from any insurance

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carrier, Construction Manager shall promptly repay such collected or recovered amounts to the Owner.

10.1.3 TRADE CONTRACTOR AND DESIGN PROFESSIONAL INDEMNITY. The Owner shall cause all Trade Contractors and the Design Professionals to agree to indemnify and hold harmless the Owner and the Construction Manager from all claims for bodily injury and property damage, other than to the Work itself and other property insured under Paragraph 10.4, that may arise from that Trade Contractor's operations or the Design Professional's services, but only to the extent that such claims result from the negligent acts or omissions of the Trade Contractor or the Design Professional, respectively, or anyone for whose acts or omissions the Trade Contractor or Design Professional, respectively, is liable.

10.1.4 NO LIMITATION ON LIABILITY. In any and all claims against the parties indemnified under this Agreement (the "Indemnitees") by any employee of the Construction Manager, anyone directly or indirectly employed by the Construction Manager or anyone for whose acts the Construction Manager may be liable, the indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Construction Manager under Workers' Compensation acts, disability benefit acts or other employee benefit acts.

10.1.5 The indemnification obligations under this Article 10 are not limited to third-party claims, but shall also apply to any claims that either Party may assert against the other.

10.1.6 Construction Manager shall be liable for any personal injury or damage to property caused by the fault or negligence of Construction Manager, its officers, directors, employees, agents and approved contractors or subcontractors. In no event shall the State be liable for injuries suffered by Construction Manager, or Construction Manager's employees, related to the work performed under this Agreement.

## 10.2 CONSTRUCTION MANAGER'S INSURANCE

10.2.1 Before commencing its services, the Construction Manager shall procure and provide to Owner proof that it has obtained and maintains in force Workers' Compensation/Employers' Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance (CGL) and Excess or Umbrella Liability Coverage as required in this section. The CGL policy shall include coverage for liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, contractual liability, and broad form property damage.

The Construction Manager's Liability policies, as required in this Subparagraph 10.2.1, shall be written on an occurrence basis with at least the following limits of liability:

10.2.1.1 Workers' Compensation --\$1,000,000 or an amount required by the laws of the state of Iowa, whichever is greater.

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10.2.1.2 Employers' Liability Insurance--\$1,000,000 or an amount required by the laws of Iowa, whichever is greater.

10.2.1.3 Business Automobile Liability Insurance \$1,000,000 Each Accident.

10.2.1.4 Commercial General Liability Insurance

a. \$1,000,000 Each Occurrence

b. \$2,000,000 General Aggregate

c. \$1,000,000 Products/Completed Operations Aggregate

d. \$1,000,000 Personal and Advertising Injury Limit

10.2.2 The Construction Manager must also carry and maintain Excess or Umbrella Liability coverage for the policies in Subparagraph 10.2.1 in the amount of \$10 million or more.

10.2.3 The Construction Manager shall maintain in effect all insurance coverage required under Subparagraph 10.2.1 and 10.2.2 with insurance companies lawfully authorized to do business in the jurisdiction in which the Project is located. If the Construction Manager fails to obtain or maintain any insurance coverage required under this Agreement, the Owner may purchase such coverage and charge the expense to the Construction Manager, or terminate this Agreement.

10.2.4 To the extent commercially available, the policies of insurance required under Subparagraph 10.2.1 and 10.2.2 shall contain a provision that the insurance company or its designee must give the Owner written notice transmitted in paper or electronic format: (a) 30 days before coverage is nonrenewed by the insurance company and (b) with 10 business days after cancelation of coverage by the insurance company. Construction Manager shall maintain completed operations liability insurance for one year after acceptance of the Work, Substantial Completion of the Project, or to the time required by the Agreement or Construction Documents, whichever is longer, in an amount no less than maintained prior to completion. Prior to commencement of services, the Construction Manager shall furnish the Owner with certificates evidencing the required coverages. In addition, if any insurance policy required under Article 10 of this Agreement is not to be immediately replaced without a lapse in coverage when it expires, exhausts its limits, or is to be cancelled, the Construction Manager shall give Owner prompt written notice upon actual or constructive knowledge of such condition.

10.2.5 PROFESSIONAL LIABILITY INSURANCE. The Construction Manager shall obtain and maintain professional liability insurance with a company satisfactory to the Owner for claims arising from its negligent errors, acts and omissions in the performance of professional services under this Agreement, written for limits of liability not less than \$2,000,000 per claim and in the aggregate with a deductible or retention not to exceed \$25,000, unless otherwise agreed to by the Owner in writing. The retroactive date of the policy shall be prior to the execution of this Agreement. To the extent commercially available, the policy shall remain in effect for ten (10) years following Substantial

Completion of the Project. Deductible or retention shall be paid by the Construction Manager.

#### 10.2.6 ADDITIONAL LIABILITY COVERAGE

10.2.6.1 Owner \_\_\_\_\_ shall/ X shall not (indicate one) require Construction Manager to purchase and maintain liability coverage, in addition to Construction Manager's coverage otherwise required under Article 10 of this Agreement.

10.2.6.2 If required by Subparagraph 10.2.6, the additional liability coverage required of the Construction Manager shall be:

[Designate Required Coverage(s)]

\_\_\_\_\_.1 Additional Insured Owner shall be named as an additional insured on Construction Manager's Insurance specified in Article 10 of this Agreement.

\_\_\_\_\_.2 OCP Construction Manager shall provide an Owners' and Contractors' Protective Liability Insurance ("OCP") policy with limits equal to the limits on Insurance specified in Article 10 of this Agreement, or limits as otherwise required by Owner.

10.6.2.3 Any documented additional cost in the form of a surcharge associated with procuring the additional liability coverage in accordance with this subparagraph shall be paid by the Owner directly or the costs may be reimbursed by Owner to Construction Manager by increasing the Contract Price to correspond to the actual cost required to purchase and maintain the additional liability coverage. Prior to commencement of the Work, Construction Manager shall obtain and furnish to the Owner a certificate evidencing that the additional liability coverages have been procured.

### ARTICLE 11

#### SUSPENSION, TERMINATION OF AGREEMENT AND OWNER'S RIGHT TO PERFORM CONSTRUCTION MANAGER'S OBLIGATIONS

##### 11.1 SUSPENSION BY THE OWNER FOR CONVENIENCE

11.1.1 SUSPENSION. The Owner may order the Construction Manager in writing to suspend, delay or interrupt all or any part of the services without cause for such period of time as the Owner may determine to be appropriate for its convenience.

11.1.2 ADJUSTMENT In the event of any such suspension, delay or interruption, the Construction Manager's Compensation shall be equitably adjusted as provided in Paragraph 7.5. No adjustment shall be made if the Construction Manager is or otherwise would have been responsible for the suspension, delay or interruption of the services, or if another provision of this Agreement is applied to render an equitable adjustment.

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## 11.2 OWNER'S RIGHT TO PERFORM CONSTRUCTION MANAGER'S OBLIGATIONS AND TERMINATION BY THE OWNER FOR CAUSE

11.2.1 OWNER'S PERFORMANCE. If the Construction Manager persistently fails to perform any of its obligations under this Agreement, the Owner may, after seven (7) Days' written notice, during which period the Construction Manager fails to either perform such obligation or to commence and continue reasonable remedial measures, undertake to perform such obligations. The Construction Manager's Compensation shall be reduced by the additional cost to the Owner, if any, of performing such obligation.

11.2.2 TERMINATION. Upon seven (7) Days' written notice to the Construction Manager, the Owner may terminate this Agreement for any of the following reasons if, during such seven (7) Day period the Construction Manager fails to either cure or commence and continue reasonable remedial measures:

11.2.2.1 the Construction Manager persistently utilizes inadequately skilled workers or an insufficient number of workers;

11.2.2.2 the Construction Manager persistently fails to abide by the orders, regulations, rules, ordinances or laws of governmental authorities having jurisdiction; or

11.2.2.3 the Construction Manager otherwise materially breaches this Agreement. Upon such termination, the Owner may take possession of the Worksite and all Project-related documents, including but not limited to the Construction Schedule and field notes, used by the Construction Manager and complete the services utilizing any reasonable means.

11.2.3 BANKRUPTCY. To the extent permitted by federal bankruptcy law, if the Construction Manager files a petition under the Bankruptcy Code, this Agreement may be terminated for cause at the discretion of the Owner. Further, the Owner may terminate the Agreement for cause at its discretion if the Construction Manager takes any of the following actions: a) Commencing or permitting a filing against it which is not discharged within ninety (90) days, of a case or other proceeding seeking liquidation, reorganization, or other relief with respect to itself or its debts under any bankruptcy, insolvency, or other similar law now or hereafter in effect; or filing an answer admitting the material allegations of a petition filed against it in any involuntary case or other proceeding commenced against it seeking liquidation, reorganization, or other relief under any bankruptcy, insolvency, or other similar law now or hereafter in effect with respect to it or its debts; or consenting to any such relief or to the appointment of or taking possession by any such official in any voluntary case or other proceeding commenced against it seeking liquidation, reorganization, or other relief under any bankruptcy, insolvency, or other similar law now or hereafter in effect with respect to it or its debts; b) Seeking or suffering the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; c) Making an assignment for the benefit of creditors; d) Failing, being unable, or admitting in writing the inability generally to pay its debts or obligations as they become due or failing to maintain a positive net worth and such additional capital and liquidity as is reasonably adequate or necessary in connection with Construction Manager's performance of its obligations under this Agreement; or e) Taking any action to authorize any of the foregoing. The Owner's right to terminate this Agreement shall be in addition to and not exclusive of other remedies available to the Owner, and the Owner shall be entitled to exercise any other rights and pursue any remedies, in law, at equity, or otherwise.

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11.2.4 ADDITIONAL GROUNDS FOR TERMINATION FOR CAUSE. The Owner may terminate the Agreement effective immediately without penalty and without advance notice or opportunity to cure for any of the following reasons:

11.2.4.1 Construction Manager furnished any statement, representation, warranty or certification in connection with this Agreement, the RFP or the Proposal that is false, deceptive, or materially incorrect or incomplete;

11.2.4.2 Construction Manager or any of its officers, directors, employees, agents, subsidiaries, affiliates, contractors or subcontractors has committed or engaged in fraud, misappropriation, embezzlement, malfeasance, misfeasance, or bad faith;

11.2.4.3 Construction Manager or any parent or affiliate of Construction Manager owning a controlling interest in Construction Manager dissolves;

11.2.4.4 Construction Manager terminates or suspends its business;

11.2.4.5 Construction Manager's corporate existence or good standing in Iowa is suspended, terminated, revoked or forfeited, or any license or certification held by Construction Manager related to Construction Manager's performance under this Agreement is suspended, terminated, revoked, or forfeited;

11.2.4.6 Construction Manager has failed to comply with any applicable international, federal, state (including, but not limited to Iowa Code chapter 8F), or local laws, rules, ordinances, regulations or orders when performing within the scope of this Agreement;

11.2.4.7 The Construction Manager engaged in conduct that: (a) has or may expose the Owner/State to material liability, or (b) has caused or may cause a person's life, health or safety to be jeopardized;

11.2.4.8 The Construction Manager infringes or violates any patent, trademark, copyright, trade dress or any other intellectual property right or proprietary right, or Construction Manager misappropriates a trade secret; or

11.2.4.9 The Construction Manager fails to comply with any applicable confidentiality or privacy laws.

11.2.5 ACCOUNTING. In the event the Owner exercises its right to reduce Construction Manager's compensation by Owner's cost as provided in this section 11.2, upon the request of the Construction Manager the Owner shall provide a detailed accounting of the cost incurred by the Owner.

11.3 TERMINATION BY OWNER FOR CONVENIENCE. The Owner may terminate this Agreement at any time for convenience.

11.3.1 TERMINATION DUE TO CHANGE IN LAW OR FUNDING. Notwithstanding anything in this Agreement to the contrary, and subject to the limitations set forth below,

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the Owner shall have the right to terminate this Agreement without penalty and without any advance notice as a result of any of the following:

11.3.1.1. The legislature or governor fail in the sole opinion of the Owner to appropriate funds sufficient to allow the Owner to either meet its obligations under this Agreement or to operate as required and to fulfill its obligations under this Agreement; or

11.3.1.2. If funds are de-appropriated, reduced, not allocated, or receipt of funds is delayed, or if any funds or revenues needed by the Owner to make any payment hereunder are insufficient or unavailable for any other reason as determined by the Owner in its sole discretion; or

11.3.1.3. If the Owner's authorization to conduct its business or engage in activities or operations related to the subject matter of this Agreement is withdrawn or materially altered or modified; or

11.3.1.4. If the Owner's duties, programs or responsibilities are modified or materially altered; or

11.3.1.5. If there is a decision of any court, administrative law judge or an arbitration panel or any law, rule, regulation or order is enacted, promulgated or issued that materially or adversely affects the Owner's ability to fulfill any of its obligations under this Contract. The Owner shall provide Construction Manager with written notice of termination pursuant to this section.

#### 11.4 TERMINATION BY THE CONSTRUCTION MANAGER

11.4.1 TERMINATION. The Construction Manager shall not terminate the Agreement for convenience. Upon seven (7) Days' written notice to the Owner, where the Owner shall be provided reasonable opportunity to cure, the Construction Manager may, in addition to any other rights or remedies it has, terminate this Agreement for any of the following reasons:

11.4.1.1 if the Work has been stopped for a thirty (30) Day period

- a. under court order or order of other governmental authorities having jurisdiction;
- b. as a result of the declaration of a national emergency or other governmental act which renders the pursuit of the Project impracticable; or
- c. because of the Owner's failure to pay the Construction Manager in accordance with this Agreement;

11.4.1.2 if the Work is suspended by the Owner for sixty (60) Days;

11.4.1.3 if the Owner materially delays the Construction Manager in the performance of its services;

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11.4.1.4 if the Owner otherwise materially breaches this Agreement; or

11.4.2 In the event there is a dispute as to whether any of the specified grounds for termination under this section 11.4 have occurred, pursuant to the dispute mitigation and resolution procedures specified in Article 12 of this Agreement the Construction Manager shall not terminate the Agreement unless and until a tribunal of competent jurisdiction has issued a binding ruling that such grounds for termination exists.

11.5 LIMITATION OF THE OWNER'S PAYMENT OBLIGATIONS. Notwithstanding anything herein to the contrary, in the event of termination of this Agreement for any reason by either party, the Owner shall pay only those amounts, if any, due and owing to Construction Manager for which the Owner is obligated to pay pursuant to this Agreement; provided however, that in the event the Owner terminates this Agreement due to lack of funds or change in law, the Owner's obligation to pay Construction Manager such amounts and other compensation shall be limited by, and subject to, legally available funds. Payment will be made only upon submission of invoices and proper proof of Construction Manager's claim. Notwithstanding the foregoing, this Section in no way limits the rights or remedies available to the Owner and shall not be construed to require the Owner to pay any compensation or other amounts hereunder in the event of Construction Manager's breach of this Agreement or any amounts withheld by the Owner in accordance with the terms of this Agreement. The Owner shall not be liable, under any circumstances, for any of the following: i. The payment of unemployment compensation to Construction Manager's employees; ii. The payment of workers' compensation claims, which occur during the Agreement or extend beyond the date on which the Agreement terminates; iii. Any costs incurred by Construction Manager in its performance of the Agreement, including, but not limited to, startup costs, overhead or other costs associated with the performance of the Agreement; iv. Any damages or other amounts associated with the loss of prospective profits, anticipated sales, goodwill, or for expenditures, investments or commitments made in connection with this Agreement; v. Any taxes Construction Manager may owe in connection with the performance of this Agreement, including, but not limited to, sales taxes, excise taxes, use taxes, income taxes or property taxes; vi. Any work performed or services provided that require licensure under the laws of the State of Iowa that were performed or provided without proper licensure

11.6 TERMINATION DUTIES. Upon receipt of notice of termination or upon request of the Owner, Construction Manager shall: i. Cease providing services under this Agreement and take all necessary or appropriate steps to limit disbursements and minimize costs, and furnish a report within thirty (30) days of the date of notice of termination, describing the status of all services provided under the Agreement and such other matters as the Owner may require; ii. Immediately cease using and return to the Agency any property or materials, whether tangible or intangible, provided by the Owner to Contractor; iii. Cooperate in good faith with the Owner and its employees, agents and independent contractors during the transition period between the notification of termination and the substitution of any replacement service provider; iv. Immediately return to the Owner any payments made by the Owner for services that were not rendered or provided by Construction Manager.

## **ARTICLE 12 DISPUTE MITIGATION AND RESOLUTION**

12.1 CONTINUANCE OF SERVICES AND PAYMENT. Unless otherwise agreed in writing, the Construction Manager shall continue its Services and maintain the Schedule of the Work during any dispute resolution proceedings. If the Construction Manager continues to perform, the Owner shall continue to make payments in accordance with this Agreement.

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12.2 DIRECT DISCUSSIONS. If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties' authorized representatives. Unless otherwise agreed to in writing, the authorized representative for the Construction Manager is identified in Paragraph 3.4 of this Agreement. The authorized representative for the Owner is identified in Paragraph 4.2 of the Agreement. The Parties' authorized representatives are, among other things, authorized to resolve matters of disagreement and disputes between the Parties to the extent permitted by Iowa law. If the Parties' representatives are, in the sole judgment of either Party, unable to resolve the dispute then the Parties may submit such matter to the dispute mitigation and / or dispute resolution procedures selected herein.

12.3 MITIGATION. If the Parties select one of the dispute mitigation procedures provided in this Paragraph 12.3, disputes remaining unresolved after direct discussions shall be directed to the selected mitigation procedure. The dispute mitigation procedure shall result in a nonbinding finding on the matter. The Parties agree that the dispute mitigation procedure shall be:

(Designate only one)

☒ Project Neutral

☐ Dispute Review Board

12.4 MITIGATION PROCEDURES. The Project Neutral/Dispute Review Board, if agreed to by the Parties, shall be mutually selected and appointed by the Parties and shall execute a retainer agreement with the Parties establishing the scope of the Project Neutral's/Dispute Review Board's responsibilities. The costs and expenses of the Project Neutral/Dispute Review Board shall be shared equally by the Parties. The Project Neutral/Dispute Review Board shall be available to either Party, upon request, throughout the course of the Project, and shall make regular visits to the Project so as to maintain an up-to-date understanding of the Project progress and issues and to enable the Project Neutral/Dispute Review Board to address matters in dispute between the Parties promptly and knowledgeably. The Project Neutral/Dispute Review Board shall issue nonbinding finding(s) within five (5) business Days of referral of the matter to the Project Neutral/Dispute Review Board, unless good cause is shown.

12.5 If the matter remains unresolved following the issuance of the nonbinding finding by the Project Neutral / Dispute Review Board (if either is selected) or if the Project Neutral/Dispute Review Board fails to issue nonbinding findings within five (5) business Days of the referral, the Parties may submit the matter to the binding dispute resolution procedure designated in Paragraph 12.6.

12.6 MEDIATION. If direct discussions pursuant to Paragraph 12.2 do not result in resolution of the matter and no dispute mitigation procedure is selected and implemented under Paragraph 12.3, the Parties may agree to resolve the matter by mediation through the current Construction Industry Mediation Rules of the American Arbitration Association, or the Parties may mutually agree to select another set of mediation rules. The administration of the mediation shall be as mutually agreed by the Parties. The mediation shall be convened within thirty (30) Days of the matter first being discussed and shall conclude within forty-five (45) business Days of the matter first being discussed. Either Party may terminate the mediation at any time after the first session, but the decision to terminate shall be delivered in person by the terminating Party to the non-terminating Party and to the mediator. The costs of the mediation shall be shared equally by the Parties. If the parties agree to submit a dispute to a mitigation procedure or mediation, and the matter remains unresolved either Party may commence litigation consistent with Section 13.2 of this Agreement. Notwithstanding anything to the contrary in this Agreement, either party may seek recourse or resolve a dispute through commencement of litigation at any time, without first submitting the matter to a mitigation procedure or mediation.

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12.7 MULTIPARTY PROCEEDING. All parties necessary to resolve a claim shall be parties to the same dispute resolution proceeding. Appropriate provisions shall, if possible, be included in all other contracts relating to the Project to provide for the consolidation of such dispute resolution procedures.

12.8 LIEN RIGHTS. The Construction Manager acknowledges that it does not have any mechanic's or other lien rights on or relating to this Project or any property of Owner.

## **ARTICLE 13 MISCELLANEOUS PROVISIONS**

13.1 ASSIGNMENT. Neither the Owner nor the Construction Manager shall assign their interest in this Agreement without the written consent of the other except as to the assignment of proceeds. The terms and conditions of this Agreement shall be binding upon both Parties, their partners, successors, assigns and legal representatives. Neither Party to this Agreement shall assign the Agreement as a whole without written consent of the other except that the Owner may assign the Agreement to any agency, department or governmental entity of the State without Construction Manager's consent. If either Party attempts to make such an assignment other than as provided herein, that Party shall nevertheless remain legally responsible for all obligations under this Agreement, unless otherwise agreed by the other Party.

13.2 GOVERNING LAW, JURISDICITON AND CHOICE OF VENUE. This Agreement and all disputes arising therefrom shall be governed by and construed and enforced in accordance with the laws of the State of Iowa, without regards to principles of conflicts of law. Construction Manager irrevocably and unconditionally confirms and agrees that it is and shall continue to be subject to the jurisdiction of the state courts of the State of Iowa and is subject to service of process in the State of Iowa. Construction Manager hereby irrevocably and unconditionally consents and submits to the exclusive jurisdiction of the District Court for Polk County, Iowa for any actions, suits or proceedings arising out of or relating to this Agreement and the transactions contemplated by this Agreement (and agrees not to commence any litigation relating thereto except in such courts), and waives any objection to the laying of venue of any such litigation in such court.

13.3 SEVERABILITY. The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision.

13.4 NO WAIVER OF PERFORMANCE. The failure of either Party to insist, in any one or more instances, on the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any of its rights, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right with respect to further performance or any other term, covenant, condition or right.

13.5 TITLES AND GROUPINGS. The title given to the Articles, Paragraphs, Subparagraphs, Clauses, and other parts and subparts of this Agreement are for ease of reference only and shall not be relied upon, used in interpreting this Agreement, or cited for any other purpose. The grouping of the articles in this Agreement under the various headings is solely for the purpose of convenient organization and in no event shall the groupings of provisions, the use of paragraphs or the use of headings be construed to limit or alter the meaning of any provisions.

13.6 RIGHTS AND REMEDIES NOT EXCLUSIVE. The various rights, powers, options, elections and remedies of the Parties provided in this agreement shall be construed as cumulative and no one of them is exclusive of the others or exclusive of any rights, remedies or priorities allowed the Parties, and shall in

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no way affect or impair the right either Party to pursue other contractual, equitable or legal remedies to which they may be entitled. The election by either party of any one or more remedies shall not constitute a waiver of the right to pursue other available remedies.

13.7 SURVIVAL. The provisions of this Agreement, which by their nature are intended to survive the termination, cancellation, completion or expiration of the Agreement, including, but not limited to, any indemnities or any expressed limitations of or releases from liability, shall continue as valid and enforceable obligations of the Parties notwithstanding any such termination, cancellation, completion or expiration.

13.8 COMPLIANCE WITH LAW AND REGULATIONS The Construction Manager shall comply with all applicable federal, state, and local laws, rules, ordinances, regulations and orders when performing services under this Agreement, including without limitation, all applicable building codes and all laws applicable to the prevention of discrimination in employment and the use of targeted small businesses as subcontractors or suppliers. The Construction Manager declares that it has complied with all federal, state and local laws regarding business permits and licenses that may be required to provide the services and work required by this Agreement. The Construction Manager further acknowledges that if this Project is a recipient of Federal financial assistance that it may be subject to requirements of Federal Acts and Executive Orders as mandated by Federal agencies having authority and jurisdiction to enforce and ensure compliance with such laws and regulations including, but not necessarily limited to, the Davis Bacon Act and other Federal Acts and Executive Orders.

13.9 EMPLOYMENT PRACTICES It is the intent of the Iowa Department of Administrative Services to assure equal employment opportunity in all contract work as required by law. The Construction Manager and all other vendors are required to take affirmative action to ensure that applicants employed or seeking employment with them are treated equally as required by law. Vendors shall not illegally discriminate against any employee. During the course of the Project, Construction Manager may be required to show compliance with the EEO and Affirmative Action requirements. Noncompliance with the provisions set forth at the time of contract award may result in termination or suspension of the Agreement in whole or in part. All vendors and service providers working under the terms of this agreement are prohibited from engaging in discriminatory employment practices forbidden by Iowa law. Vendors shall complete and submit a nondiscrimination clause form (in form to be specified by the Owner) for the Owner's approval.

13.10 LABOR RELATIONS. In accordance with Executive Order Number 69, issued on or about January 14, 2011, no project labor agreement (also known as a PLA), or similar, will be used on this Project. Iowa is a right to work state. No consultant, contractor, or employee shall be obligated to contract with or join any labor organization as a condition of performing work on this Project. The Construction Manager shall comply with all Iowa and Federal labor laws.

13.11 SETOFF. Pursuant to Iowa Code Section 8A.504, in the event that Construction Manager owes the State any sum under the terms of this Contract, any other contract or agreement, pursuant to a judgment, or pursuant to any law, the State may, in its sole discretion, set off any such sum against: (1) any sum invoiced by, or owed to, Construction Manager under this Agreement, or (2) any sum or amount owed by the State to Construction Manager, unless otherwise required by law. The Construction Manager agrees that this provision constitutes proper and timely notice under any applicable laws governing setoff.

13.12 LEGISLATIVE CHANGES. The Construction manager expressly acknowledges that the contracted services are subject to legislative change by either the federal or state government. Should either legislative body enact measures which alter the Project, the Owner shall use best efforts to provide written notice to

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the Construction Manager of any legislative change. The parties shall meet and make a good faith effort to agree upon changes to the Agreement to address the legislative change.

13.13 Construction Manager represents, warrants and covenants that all services to be performed under this Agreement shall be performed in a professional, competent, diligent and workmanlike manner by knowledgeable, trained and qualified personnel, all in accordance with the terms of this Agreement and the standards of performance considered generally acceptable in the industry for similar tasks and projects. In the absence of a term for the performance of any portion of this Agreement, the parties agree that the applicable term shall be the generally accepted industry standard.

13.14 NON-EXCLUSIVE RIGHTS. This Agreement is not exclusive. The Owner reserves the right to select other vendors to provide services similar or identical to those described in this Agreement.

13.15 AUTHORIZATION. Construction Manager represents and warrants that: i. It has the right, power and authority to enter into and perform its obligations under this Agreement. ii. It has taken all requisite action (corporate, statutory or otherwise) to approve execution, delivery and performance of this Agreement, and this Agreement constitutes a legal, valid and binding obligation upon itself in accordance with its terms.

13.16 SUCCESSORS IN INTEREST. All the terms, provisions, and conditions of the Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns and legal representatives.

13.17 RECORDS RETENTION AND ACCESS. The Construction Manager shall maintain accurate, current, and complete records of the financial activity of this Agreement which sufficiently and properly document and calculate all charges billed to the Owner throughout the term of this Agreement and for a period of at least five (5) years following the date of final payment or completion of any required audit (whichever is later). If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the five (5) year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular five (5) year period, whichever is later. The Construction Manager shall permit the Owner, the Auditor of the State or any other authorized representative of the State and where federal funds are involved, the Comptroller General of the United States or any other authorized representative of the United States government, to access and examine, audit, excerpt and transcribe any pertinent books, documents, papers, electronic or optically stored and created records or other records of the Construction Manager relating to orders, invoices or payments or any other documentation or materials pertaining to this Contract, wherever such records may be located. The Construction Manager shall not impose a charge for audit or examination of the Construction Manager's books and records. Based on the audit findings, the Owner reserves the right to address the Construction Manager's board or other managing entity regarding performance and expenditures. When state or federal law or the terms of this Agreement require compliance with OMB Circular A-87, A-110, or other similar provision addressing proper use of government funds, the Contractor shall comply with these additional records retention and access requirements:

13.17.1 Records of financial activity shall include records that adequately identify the source and application of funds. When the terms of this Agreement require matching funds, cash contributions made by the Construction Manager and third party in-kind (property or service) contributions must be verifiable from the Construction Manager's records. These records must contain information pertaining to contract amount, obligations, unobligated balances, assets, liabilities, expenditures, income and third-party reimbursements;

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13.17.2 The Contractor shall maintain accounting records supported by source documentation that may include but are not limited to cancelled checks, paid bills, payroll, time and attendance records, and contract award documents;

13.17.3 The Contractor, in maintaining project expenditure accounts, records and reports, shall make any necessary adjustments to reflect refunds, credits, underpayments or overpayments, as well as any adjustments resulting from administrative or compliance reviews and audits. Such adjustments shall be set forth in the financial reports filed with the Agency;

13.17.4 The Contractor shall maintain a sufficient record keeping system to provide the necessary data for the purposes of planning, monitoring and evaluating its program.

13.18 QUALIFICATIONS OF STAFF. Notwithstanding anything herein to the contrary, the Construction Manager shall be responsible for assuring that all persons, whether they are employees, agents, subcontractors or anyone acting for or on behalf of the Construction Manager, are qualified, properly licensed, certified or accredited to perform the services.

13.19 SOLICITATION. The Construction Manager represents and warrants that no person or selling agency has been employed or retained to solicit and secure this Agreement upon an agreement or understanding for commission, percentage, brokerage or contingency excepting bona fide employees or selling agents maintained for the purpose of securing business.

13.20 COUNTERPARTS. The Parties agree that this Agreement has been or may be executed in several counterparts, each of which shall be deemed an original and all such counterparts shall together constitute one and the same instrument.

13.21 SUSPENSIONS AND DEBARMENT. The Construction Manager certifies pursuant to 48 CFR Part 9 that neither it nor its principles are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this Agreement by any federal agency. The Construction Manager certifies that it is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in any contracts with the State of Iowa.

13.22 CONFLICTS OF INTEREST. Construction Manager represents, warrants, and covenants that no relationship exists or will exist during the Agreement period between the Construction Manager and the Owner that is a conflict of interest. No employee, officer or agent of the Construction Manager or subcontractor shall participate in the selection or in the award or administration of a subcontract if a conflict of interest, real or apparent, exists. The provisions of Iowa Code ch. 68B shall apply to this Agreement. If a conflict of interest is proven to the Owner, the Owner may terminate this Agreement, and the Construction Manager shall be liable for any excess costs to the Owner as a result of the conflict of interest. The Construction Manager shall establish safeguards to prevent employees, consultants, or members of governing bodies from using their positions for purposes that are, or give the appearance of being, motivated by the desire for private gain for themselves or others with whom they have family, business, or other ties. The Construction Manager shall report any potential, real, or apparent conflict of interest to the Owner.

13.23 CERTIFICATION REGARDING SALES AND USE TAX. By executing this Agreement, the Construction Manager certifies it is either (a) registered with the Iowa Department of Revenue, collects,

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and remits Iowa sales and use taxes as required by Iowa Code chapter 423; or (b) not a "retailer" or a "retailer maintaining a place of business in this state" as those terms are defined in Iowa Code subsections 423.1(42) & (43). The Construction Manager also acknowledges that, at the Owner's sole discretion, the Owner may terminate this Agreement for cause if the certification in this paragraph is discovered to be false. The Construction Manager also understands that fraudulent certification may result in the Owner or its representative filing for damages for breach of contract.

**13.24 RIGHT TO ADDRESS THE BOARD OF DIRECTORS OR OTHER MANAGING ENTITY.** The Owner reserves the right to address the Construction Manager's board of directors or other managing entity of the Construction Manager regarding performance, expenditures and any other issue as appropriate. The Owner determines appropriateness.

**13.25 REPAYMENT OBLIGATION.** In the event that any State and/or federal funds are deferred and/or disallowed as a result of any expenditure by the Construction Manager in violation of the laws or regulations applicable to such funds, the Construction Manager shall be liable to the Owner for the full amount of any claim disallowed and for all related penalties incurred. The requirements of this paragraph shall apply to the Construction Manager as well as its subcontractors. The Construction Manager shall cause its subcontractors to agree to a repayment obligation substantially identical to this paragraph and shall furnish owner with a copy of such agreement.

**13.26 FURTHER ASSURANCES AND CORRECTIVE INSTRUMENTS.** The Parties agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such amendments hereto (meeting the requirements of Section 2.2 of this Agreement) and such further instruments as may reasonably be required for carrying out the expressed intention of this Agreement.

**13.27 OPEN RECORDS.** This Agreement, and all related documents and records in the possession of the Owner are public records subject to the open records requirements of the State of Iowa currently contained in Chapter 22 of the Iowa Code and may therefore be required by law to be made available for public inspection. The Construction Manager has no right or expectation of confidentiality with respect to this Agreement and all related documents and records.

**13.29 USE OF NAME OR INTELLECTUAL PROPERTY.** Construction Manager agrees it will not use the Owner and/or State's name or any of their intellectual property, including but not limited to, any State, state agency, board or commission trademarks or logos in any manner, including commercial advertising or as a business reference, without the expressed prior written consent of the Owner and/or the State.

**13.30 TAXES.** The State is exempt from Federal excise taxes, and no payment will be made for any taxes levied on Construction Manager's employee's wages. The State is exempt from State and local sales and use taxes on the services.

**13.31 NO MINIMUMS GUARANTEED.** The Agreement does not guarantee any minimum level of purchases or any minimum amount of compensation.

**13.35 LICENSING REQUIRED.** Nothing in the Agreement shall authorize the Construction manager to perform any work or provide any services that require licensure under the laws of the State of Iowa unless the Construction Manager is so licensed or retains a properly licensed professional, if otherwise allowed under the Agreement.

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## **ARTICLE 14 CONTRACT DOCUMENTS**

14.1 DIGITIZED DOCUMENTS. If the Owner requires that the Owner, Design Professional and Construction Manager exchange documents and data in electronic or digital form, prior to any such exchange, the Owner, Design Professional and Construction Manager shall agree on a written protocol governing all exchanges in a written agreement which, at a minimum, shall specify: (1) the definition of documents and data to be accepted in electronic or digital form or to be transmitted electronically or digitally; (2) management and coordination responsibilities; (3) necessary equipment, software and services; (4) acceptable formats, transmission methods and verification procedures; (5) methods for maintaining version control; (6) privacy and security requirements; and (7) storage and retrieval requirements. Except as otherwise agreed to by the Parties in writing, the Parties shall each bear their own costs as identified in the protocol. In the absence of a written protocol, use of documents and data in electronic or digital form shall be at the sole risk of the recipient.

### 14.2 ENUMERATION OF DOCUMENTS INCORPORATED INTO THIS AGREEMENT

14.2.1 DOCUMENTS. This Agreement includes the following documents:

14.2.1.1 The Standard Form of Construction Management Agreement between Owner and Construction Manager;

14.2.1.2 (List all other documents to be included in the Agreement).

A. State of Iowa RFP 0215335062

14.3 OTHER PROVISIONS. (Insert here other provisions, if any that pertain to this Agreement.)

This Agreement is executed and made effective as of the day and year first written above.

**OWNER: Iowa Department of Administrative Services**

BY: \_\_\_\_\_

PRINT NAME:

PRINT TITLE: Director or Designee

DATE: \_\_\_\_\_

ATTEST: \_\_\_\_\_

**CONSTRUCTION MANAGER:**

BY: \_\_\_\_\_

PRINT NAME: \_\_\_\_\_

PRINT TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_

ATTEST: \_\_\_\_\_

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